UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

NEW YORK PAVING, INC. Employer,	:	
and	:	Case 29-CD-203385
HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL 1010, LIUNA, AFL-CIO Charged Party,	:	
and	:	
LOCAL LODGE CC175, IAM AND AEROSPACE WORKERS, AFL-CIO Intervenor.	:	

MEMORANDUM OF LAW ON BEHALF OF CHARGED PARTY

Dated: New York, New York
December 8, 2017

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PRELIMINARY STATEMENT

This is a jurisdictional dispute proceeding under §10(k) of the National Labor Relations Act ("Act"). On July 26, 2017, New York Paving, Inc. ("Employer" or "NYP") filed a charge against Highway Road and Street Construction Laborers Local 1010, Laborers International Union of North America ("LIUNA"), AFL-CIO ("Charged Party" or "Local 1010") alleging that Local 1010 violated §8(b) (4) (D) by engaging in proscribed activity with an object of forcing the Employer to continue to assign certain work to employees it represents rather than to employees represented by Local Lodge CC175, International Association of Machinists & Aerospace Workers, AFL-CIO ("Local 175"). The §10(k) hearing was held at Region 29, in Brooklyn, New York, on September 5, 6 and October 2, 10, 2017 before Hearing Officer Brady Francisco-Fitzmaurice.

The Parties have stipulated that the Employer is engaged in commerce within the meaning of §§2 (6) and (7) (2) of the Act and that Locals 1010 and 175 are labor organizations within the meaning of §2 (5) of the Act. The Parties have also stipulated that the work in dispute involves five different disputed tasks: 1) excavation work; 2) seed and sod installation (hereinafter sometimes "landscaping"); 3) clean-up work; and 4) saw cutting, at various locations in the City of New York (hereinafter sometimes collectively "disputed tasks"). (Bd. Ex. 3, ¶¶ 6, 7, 9, 10). The Parties have stipulated that both unions have claimed the work in dispute and that there is no agreed upon method for the voluntary adjustment of their disputes to which all parties are bound. (*Id.* at ¶¶ 11, 12).

The Board may proceed to make a determination under §10(k) in this case, as the undisputed facts establish that there is reasonable cause to believe that §8(b) (4) (D) has been

violated because: 1) there are competing claims to the work; 2) Local 1010 has issued a threat to picket and engage in work stoppages if the work is reassigned to Local 175, which is the type of threat that is a proscribed means of enforcing claims to disputed work; and 3) there is no agreed upon voluntary method to adjust the dispute.

Section 10(k) requires the Board to make an affirmative award of the disputed work. See *NLRB v. Electrical Worker IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577, 81 S. Ct. 330, 5 L. Ed. 2d 302 (1961). The Board has held that an award of disputed work in a jurisdictional dispute proceeding requires an act of judgment based upon common sense and experience, reached by balancing the relevant factors. See *Laborers International Union of North America Local 1184 (High Light Electric, Inc.)* 355 NLRB 167, 169 (2010) (citing *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962)).

The evidence in this case establishes that with respect to each of the disputed tasks the relevant factors overwhelmingly compel an award of the work to Local 1010. Local 1010 requests that the Board issue an area wide award. Normally §10(k) awards are limited to the job sites where the unlawful conduct has been threatened. Local 1010 has not limited its threats to specific job sites and it is well known to Region 29 and to the Board that disputes between the two unions have been bitter and prolonged, so that it is likely that the dispute will be renewed by one or the other of the unions, if the Board does not issue an area wide award.

II.

STATEMENT OF FACTS

A. The Parties.

Employer is a construction company that has for many years performed sidewalk and street restoration work exclusively for utility companies in the five boroughs of New York City. NYP has worked for and continues to work for Howland Construction, a sub-contractor to the utilities,

and also contracts directly with Con Edison and National Grid for some of their work. (T266:13-268:21). Since 2006 Local 1010 has been certified as the collective bargaining representative of NYP's "site and grounds improvement, utility, paving and road building workers" who primarily perform the laying of concrete, including, *inter alia,* landscape planting employees and small power tools and small equipment operators in the five boroughs of New York City. (Jt. Ex. 5). Since 2007, Local 175 has been certified as the collective bargaining representative of NYP's workers who primarily perform asphalt paving, including *inter alia* landscape planting installers and small equipment operators. (Jt. Ex. 3). Both unions have collective bargaining agreements with the Employer. (See Jt. Ex. 1(A) – (C), Local 1010 CBA; Local 175 Ex. 1, Local 175 CBA).

B. Events Giving Rise to the Dispute and Local 1010's Proscribed Conduct.

New York City's Department of Transportation ("DOT") establishes the standards that govern street restoration work for utility companies. In August, 2016, DOT made substantial changes to the standards that radically affected the operations of construction companies doing street restoration for utility companies. The changes had two different effective dates: October 1, 2016 and April 1, 2017. (Emp. Ex. 1, pp. 1-4). As a result of the changes effective October 1, 2016, NYP and other utility contractors were required to saw cut all street cuts to a certain depth and shape, before repaving them with asphalt. The new requirement meant that NYP and other utility contractors had to excavate fill, temporary asphalt and concrete base before repaving, work that had never been previously required under their contracts with the utility companies. Also, as a result of the changes made effective April 1, 2017, NYP and other utility contractors were required to restore the streets with concrete, that is, they were prohibited from putting asphalt back into the street. (*Id.*). Asphalt was permitted only as the top coat. Before the new rules, NYP had dug up old concrete and temporary asphalt only when doing concrete restoration of sidewalks.

Historically at NYP, members of Local 1010, the union certified to represent laborers doing "primarily concrete" did the excavation and concrete restoration of the City's sidewalks. Effective October 1, 2017, NYP also assigned the newly required excavation and concrete restoration of the City's streets to employees represented by Local 1010. (T623:15-627:11).[1] Members of Local 175 as the union certified to represent laborers doing "primarily asphalt" continued to the final paving, now on top of the restored concrete instead of dirt and/or temporary asphalt.

On April 28, 2017, Local 175, by its counsel, filed a grievance against NYP alleging that its assignment to Local 1010 of the street excavation work – also referred to as "dig out work" – violated Local 175's collective bargaining agreement.[2] The grievance also claims that the Employer assigned other work – seed and sod installation, clean-up work, saw cutting and binder work – to Local 1010 in violation of the local 175 CBA. The grievance claims that all of the foregoing tasks had previously been performed by members of Local 175 and were wrongfully assigned to Local 1010. (Jt. Ex. 6). On July 6, 2017, Local 175, by its counsel, filed an unfair labor practice charge also alleging that beginning in April, NYP had wrongfully assigned the work of "dig ups," seed and sod installation, clean-up work, saw cutting and the laying of binder to Local 1010. (Jt. Ex. 7). On July 25, 2017, having learned of the grievance and the unfair labor practice charge, Local 1010, by undersigned counsel, notified NYP that if NYP assigned the tasks in issue to Local 175, Local 1010 would act to protect its members' rights to do the work in question, including but not limited to strikes and work stoppages. (Jt. Ex. 4). During the course of the §10(k) hearing, Local 1010's Vice President, Lowell Barton, having heard a rumor that NYP was prepared to cut a deal with Local 175 and give it some of the street excavation work, paid a

[1] Citations are to page and line numbers of the Official Transcript.
[2] The parties stipulated that the terms "dig up work," "dig out work," and "excavation" all mean the same thing. (T733:7-19).

visit to NYP and stated unequivocally that Local 1010 would pull all of its members if that happened. (T764:23-766:11).

On July 26, 2017, NYP filed a charge under §8(b) (4) (D) of the Act alleging that Local 1010's threats constituted prohibited conduct with the aim of forcing NYP to continue to assign the disputed work to Local 1010 members. (Bd. Ex. 1). Since these events the parties have stipulated that binder work is not in dispute. (Jt. Ex. 3, ¶ 9).

C. The Nature and History of the Disputed Work at NYP.

The various disputed tasks each have a different history at NYP:

1. The Facts Relevant to Seed and Sod Installation.

The testimonial evidence established that there is no real dispute that seed and sod installation and saw cutting have historically been performed by Local 1010 members. Seed and sod work is planting to restore lawns that have been ripped up by Howland or National Grid when laying their conduit or as a result of Local 1010's laying of concrete forms. (T45:12-18; 128:4-18). Because 100% of the work is related to the cutting of concrete sidewalks, which is work that is done exclusively by Local 1010, it has historically made sense from the perspective of economics and efficiency for Local 1010 to perform the work rather than Local 175. (127:19-129:8; 591:7-592:10). Local 175 shop steward Pasquale "Pat" Labate, called by the Employer, acknowledged candidly that Local 175 members had not done seed and sod installation at NYP for the last 10 or 12 years. Labate's testimony corroborated that of Peter Micelli, the Employer's Operations Manager, with 30 years at NYP, who also testified that Local 1010 had been doing NYP's seed and sod work exclusively for the past 10 or 11 years. (T104:3-17; 125:13-16:6). The only exception was the occasional assignment of the work on rainy weekends to Local 175 foreman. (T127:3-9). Even Local 175's witness Louis "Lou" Dadabo, while claiming that both

unions had done the work, admitted that in his memory Local 175 had not done any seed and sod installation in the last five years. (T667:19-23).

2. The Facts Relevant to Saw Cutting Work.

Similarly, the evidence establishes that saw cutting work has been Local 1010's work for the past six years. Saw cutting involves making a straight edge on concrete on asphalt. (T135:6-9). Before the 2016 rule changes, the company was doing what was called "one step," which involved no excavation of street cuts and no need to do any saw cutting because NYP workers were simply laying 12 inches of asphalt on top of the fill left by Howland or National Grid after laying their conduit. (T121:14-25). Before the company went to "one step," the saw cutting crew was one Local 175 worker and one Local 1010 worker. NYP removed the Local 175 worker from the saw cutting crew when, as a result of going to "one step," 99% of the saw cutting work was sidewalks. (T137:13-23). Since 2010 or 2011 there has been virtually no saw cutting of asphalt required. (T135:25-136:2137:23). Local 175 witness Lou Dadabo acknowledged that it had to be at least seven years since a local 175 member had done saw cutting at NYP. (T669:1-4). Sometime in 2011 or 2012, Local 175 Business Manager Roland Bedwell had inquired of Micelli what had happened to the saw cutting work. When Micelli explained that there was no more asphalt saw cutting work, Bedwell had replied "makes sense to me." (T139:7-13). Until the grievance of April 28, 2017, Local 175 had never filed a grievance about saw cutting. (T139:14-16).

Before October, 2016, only about 5% of the cuts in the street involved excavation or "dig outs." (T121:14-17). The rule changes now mandate cut backs in every street cut, in preparation for the concrete restoration. Currently, 75% of NYPs saw cutting work is on sidewalks, 10% is on bus stops, and the remaining 15% is the newly mandated cut backs on street cuts in preparation for the concrete restoration, which is likely to increase. (T135:10-17). Local 1010 always did the

saw cutting of sidewalks and bus stops; there was virtually no saw cutting in the street cuts; now that there is, Local 1010 concrete crews are doing the saw cutting on street cuts, just as they have always done on sidewalks and bus stops, because it is primarily concrete work. (T155:3-6).

3. The Facts Relevant to Clean Up Work.

Clean up work involves the removal of cones and barricades laid down by a crew. According to Micelli, each union's members perform the clean up in connection with the work their crew has done. (T129:17-19). The sidewalk and concrete excavation and restoration crews clean up after themselves and the asphalt paving crew cleans up after itself. (T129:131). Micelli testified that the recent changes in regulations mean that as much as 80% of clean up work is now concrete related. (T133:12-21).

4. The Facts Relevant to Excavation Work.

The excavation work in dispute concerns excavation of the road bed on street cuts. There is no dispute about excavation of sidewalks. (T53:17-54). Sidewalks are concrete and before the October, 2016 and April, 2017 rules changes, Local 1010 had always done excavation of the concrete and any temporary asphalt in preparation for the restoration of concrete sidewalks. (T280: 2-12; T285:14-19). For a brief period, from October, 2016 to April, 2017, NYP assigned Local 175 to excavate street cuts – only because the new rules requiring restoration of the base with concrete had not yet gone into effect. (T399:14-24; T400:10-21). Once the rules mandating restoration of the base with concrete went into effect, NYP assigned the excavation work, in preparation for the concrete pour, to Local 1010, so that Local 1010 laborers are now doing the same work on street cuts that they have always done on sidewalks. (T44:17-25; T45:1-8; T298:4-25; T299:1-10).

Local 175's witness Dadabo acknowledged that, except for the six-month interregnum between October, 2016 and April, 2017, the only excavation work that Local 175 laborers had done on street cuts (before October, 2016) was exclusively in the Bronx. (T690:15-20). That work did not involve any cut backs, in particular it did not involve the full depth cut back now being done for the utility as a result of the new rules. (T75:20-706:6). A full depth cut back involves doing an additional cut back that must be done with a saw and not a jackhammer. (T685:3-17; T712:20-25). Thus, there is no real dispute that any dig up work that was done before October, 2016 by Local 175 laborers to prepare the hole for asphalt was very different than the excavation work currently being done to prepare the street cut for restoration of the concrete road base.

Micelli estimated that any pre-October, 2016, "dig out" or excavation work on street cuts (as opposed to sidewalks) amounted to only on about 5% of the street cuts. (T626:8-17). That was the only excavation work that Local 175 laborers did for NYP before the October to April period. (T399:14-24; T400:10-21). Micelli was very clear that the only reason that the work was assigned to Local 175 laborers was because it was in preparation for asphalt paving. (T188:14-22). NYP still was able to put asphalt into the hole, because DOT had delayed enforcement of the rule that requires concrete base restoration in kind or better on all streets until April 1, 2017. (T112:13-20). Local 175 witness Dadabo acknowledged that Local 1010 laborers do not lay any asphalt and their excavation work is in preparation for a concrete pour. (T694:16-695:1).

Dadabo also acknowledged that before October, 2016, except for the limited Bronx work, no dig out work or preparation was required to do the asphalt paving on street cuts; the only thing that his Local 175 crew did was pave the hole that had been filled by the utility with asphalt. (T693:3-22; 710:15-25).

There can be no real dispute that the rule changes in 2016 and 2017 required substantial changes in NYP's street cut work for the utilities. (T112:17-25; 113:1-22). Before October 1, 2016, Howland or National Grid excavated and backfilled, leaving 12 inches for the utility contractor to fill with asphalt using three separate four-inch lifts of asphalt. There were no dig outs and no concrete going in the hole. (T624:9-25). The City implemented new rules because the utilities had failed to put concrete back into the holes and their holes sank. Now everything is being cut back and concrete base being put in so it can't sink. (T614:9-615:8). As a result, before April 1, 2017, where NYP employees did primarily asphalt paving on street cuts, they now are doing primarily excavation, including full depth cut backs, in preparation for the concrete base and pouring the concrete base.

5. Facts Relevant to Area and Industry Practice.

Local 1010 Vice President Lowell Barton testified about nine companies at which Local 1010 has been certified as the collective bargaining representative of the employees who perform primarily concrete work. (Local 1010 Ex. 6, 7, 8, 9, 12, 13, 14, 15, 16). He testified that each of the companies does excavation work for utilities companies using Local 1010 represented laborers (T835:23-836:7; 837:25-383:7; 845:15-21; 849:14-850:7; 851:3-9; 854:9-14; 855:8-14). He testified that each of the companies has either an independent or GCA collective bargaining agreement with Local 1010 covering excavation and restoration work. (T830:22-T831:18; 839:2-14; 847:22-848:19; 850:8-851:2; 851:22-852:13; 855:1-7; 856:18-857:6). Local 1010's agreement with the GCA covers utility excavation and restoration work at Article VII, Sec. 1 (3) (5) (14) and (15). (Local 1010 Ex. 1). The Independent Agreement covers the work at Article VI, Sec. 1 (3) (5) (14) and (15). (Local 1010 Ex. 3). Both agreements cover the five boroughs of New York.

Barton's testimony combined with the certifications and the collective bargaining agreements, establish that the general practice in the utility industry in New York is that utility contractors use Local 1010 represented employees to do excavation work and concrete restoration work in the five boroughs.

III

ARGUMENT

THE BOARD HAS JURISDICTION TO MAKE A DETERMINATION UNDER §10(k) AND THE RELEVANT FACTORS COMPEL AN AWARD OF THE WORK TO LOCAL 1010, WHICH SHOULD BE AREA WIDE

A. The Board has Jurisdiction to Make a Determination Under §10(k) of the Act.

Before the Board may proceed with determining a dispute under§10(k) of the Act, there must be reasonable cause to believe that §8(b) (4) (D) has been violated. This standard means that the Board must find that there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work. *Operating Engineers Local 150 (R & D Thiel)*, 345 NLRB 1137, 1139 (2005). The Board will not proceed to make a determination under §10(k) if the parties are bound to a voluntary dispute resolution mechanism.

It is beyond peradventure that the standards for the Board to make a determination have been met. The parties have stipulated that both unions claim each and all of the disputed tasks. No party has submitted evidence of any agreement binding the parties to a method of voluntary adjustment and the parties have stipulated that no such agreement exists. (Bd. Ex. 3, ¶11, 12).

There is no real dispute that Local 1010 has used proscribed means to enforce its claim to continued jurisdiction over the work assigned to it by the Employer. As soon as Local 1010 learned of Local 175's demands that the Employer take the work away from Local 1010 and assign it to

Local 175, Local 1010 warned NYP in writing that any reassignment would result in work stoppages and picketing. (Joint Ex. 4). Local 1010's Vice President later reinforced the threat. The Board has long considered such threats to be a proscribed means of enforcing claims to disputed work. *LIUNA Local 860 (Ballast Construction)*, 2016 NLRB 712, 713 (2016).

Local 175 has tried to argue that because an officer of Local 1010 is married to the holder of a minority interest in NYP the threat to strike cannot possibly be real. Local 175 put forward no evidence, other than the fact of the marriage itself, that Local 1010 did not intend its threat seriously. It is respectfully submitted that absent any evidence of collusive behavior, the Hearing Officer should not have admitted evidence of the marital relationship and the argument should be condemned by the Board as based upon antediluvian and sexist concepts of spousal relationships harking back to an earlier age.

In the absence of evidence that Local 1010 did not intend its threat seriously, charged party's use of language that on its face threatens economic action is sufficient to find reasonable cause to believe that §8(b) (4) (D) has been violated. *LIUNA Local Union 1184 (High Light Electric, Inc.)*, 355 NLRB 167, 169 (2010).

The dispute is thus properly before the Board for determination under §10(k).

B. The Merits of the Dispute Compel an Award of the Work to Local 1010.

Section 10(k) requires the Board to exercise its judgment in making an award of the work and to balance the relevant factors in any particular case. The following factors are relevant in making a determination of the instant dispute:

1. Certifications and collective bargaining agreements.

Local 1010's certification provides that the union represents utility employees who primarily perform concrete. (Jt. Ex. 5). Local 175's certification covers employees who primarily

perform asphalt. As all of the work in question clearly has to do with the preparation for and the clean up of concrete work, the certification supports and award of all of the work to Local 1010.

a) Excavation Work: With respect to the excavation work, the Employer stated clearly that the reason it awarded the work to Local 1010, after DOT made operative the rules change requiring restoration of the concrete base, is that the dig out was in preparation for the concrete pour.

b) Saw Cutting and Landscaping: Saw cutting and landscaping work, are both directly related to concrete work. Indeed Local 175 had been taken off the saw cutting crew, when the amount of asphalt saw cutting dwindled to nothing. The testimony established that landscaping work was done only on sidewalks and was necessitated by and followed the concrete work that Local 1010 did.

c) Clean Up Work: The clean up work is also directly related to the concrete work because the testimony by all witnesses is that each union does its own clean up. Local 1010 removes the cones and barriers after completing the concrete restoration and Local 175 removes cones and barriers after it completes the final asphalt top.

Thus Local 1010's certification as the representative of employees doing "primarily concrete" work clearly supports Local 1010's claim to each and all of the disputed tasks.

Local 1010's CBA with NYP (Jt. Ex. 1B) also favors an award of the work to Local 1010:

a) Excavation work is covered by Article VI Sec. 1(b), removal of old pavement and placing of all concrete when used as a base for other types of pavement and Section 1(j) restoration of all paving subsequent to sewer and gas mains;

b) Landscaping is covered by Article VI, Sec. 1(l), which encompasses landscaping including planting of grass etc;

c) Saw cutting is covered by Article VI Sec 1(b), removal of old pavement and Sec. 1(k), operating small power tools;

d) Clean Up Work is covered by Article VI, Sec. 1(d), stripping of all forms and 1(o), maintenance and protection of traffic safety. (Jt. Ex. 1B, p. 2).

Local 175's CBA does not incorporate concrete into its scope of work. The restoration work in Local 175's CBA is limited to "asphalt slurry (protective polymer) restoration work, including all preparation for slurry and all bridges, temporary asphalt paving necessary on streets, sidewalks and private property and federal, city, local and state and roads subsequent to subway, sewer, water main, duct line construction and other similar type jobs." (Local 175 Ex.1 at Article VIII § 1(b)).

Thus, the unions' certifications and CBAs favor an award of all of the work to Local 1010.

2. Employer preference and past practice (see also Efficiency below).

a) Excavation Work: Operations Manager Micelli testified that NYP had historically assigned excavation work on sidewalks to Local 1010 because it is concrete work and has always been Local 1010's work. As a result, when concrete restoration was required in street cuts, it was a "no brainer" to assign the same work to Local 1010 on the street cuts. (T123:19). Local 1010 is doing in the streets the same functions of digging out concrete and temporary asphalt, just like they have always done on sidewalks. (T627:4-11). The only difference between the work on street cuts and on sidewalks is that in the former case the laborers do not have to finish the concrete. (T180:19-23). He was emphatic that NYP wants to continue that assignment. (T117:21-118:6; 140:20-23).

b) Saw Cutting: Micelli testified that about seven years ago, when one-step had become the dominant mode of operation, he removed the Local 175 laborer from the saw cutting crew and

assigned all saw cutting work to Local 1010 because saw cutting had become all concrete work. He asserted that NYP wants to continue that assignment and has no interest in sharing the work between the two unions, as their ability to cooperate is nonexistent.

c) Landscaping: Micelli also testified that landscaping, i.e. seed and sod work, is related only to sidewalk work, is done by Local 1010 after completing the sidewalk restoration, and has been performed exclusively by Local 1010 for the past 10 or 11 years. (T123:18-22).[3] He noted that he had only occasionally assigned landscape work to Local 175 foremen on rainy weekends. Micelli explained that it made no sense to assign the work to Local 175 because there is so much concrete work.

d) Clean Up Work: Micelli reiterated several times that clean up work that is concrete-related is done by Local 1010 and clean up work that is asphalt-related is still done by Local 175.

Thus, the factors of past practice and employer preference overwhelmingly favor an award of all of the work to Local 1010.

3. Economy and Efficiency of Operations.

a) Excavation Work: The Employer presented powerful evidence that given local politics the Employer benefits enormously from assigning the excavation work to Local 1010. It has proven of utmost importance to the Employer both from an efficiency and a community relations point of view to be able to assign a large volume Local 1010 concrete crew under the control of a single foreman with the flexibility to assign work over a broad swath of streets. It makes sense to cover both sidewalk and street work in a community on the same days over an extended period of time. (T544:11-55:18; 630:4-631:21). The Employer testified that to have three crews, Local 175 doing excavation, Local 1010 pouring concrete, and Local 175 laying asphalt, would be highly

[3] Local 175 first began to represent workers at New York Paving only in 2005.

inefficient and mixed crews simply would not work given the lack of cooperation between the unions. (T195:16-196-2; 582:10-583:13; 598:12-20). Moreover, as the Hearing Officer recognized in a colloquy with a witness, since the sidewalks have always been concrete, and the streets were becoming more concrete than asphalt, it is more efficient to have employees trained in concrete do both. (T117:10:21).

b) Landscaping and Clean Up: The Employer testified that seed and sod work is a by-product of the concrete sidewalk work done by Local 1010. One hundred percent of seed and sod work is on the sidewalks. (T127:19-24; 592:3-10). Local 1010 members do the landscaping and clean up work when they are doing the sidewalks: pouring the forms, putting topsoil, putting seed and sealing the joints all at the same time. Micelli testified that it would be impossible to have one union pull barricades, i.e. do clean up, and not do the seed and sod and the soil or the joint sealing. (T127:10-18).

c) Saw Cutting: As the evidence is that virtually all saw cutting work is concrete work, Micelli testified that it would make no sense from an efficiency or economy point of view to have Local 175 do saw cutting. (T140:12-23). In fact, it was because saw cutting asphalt had declined to almost nothing that Micelli removed the Local 175 man from the saw cutting crew. (T135:6-137:23). When Local 175 Business Manager Bedwell inquired as to the reasons Micelli had done that and Micelli had explained, even Bedwell accepted the result as "mak[ing] sense." (T138:6-139:13).

The factors of efficiency and economy indubitably favor an award of each and all of the tasks to Local 1010. See, e.g., *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 302, 305 (2010) (finding economy and efficiency favors awarding work to employees who can perform all aspects of work in dispute over employees who can perform only one aspect); see also,

Operating Engineers Local 150 (R&D Thiel), 345 NLRB 1137, 1141 (2005) (considering additional costs associated with one group of employees sitting idle while another group works).

4. Relative Skills and Training.

a) Excavation: The evidence is that Local 1010 employees have more skills related to excavation on street cuts than do Local 175 employees, because Local 175 employees had done barely any excavation work prior to their brief assignment from October, 2016 to April, 2017, while Local 1010 employees have been doing sidewalk excavation for years. For three decades prior to 2017, if anything had to be excavated on street cuts, it was only back fill and it was minimal in quantity. (T166:23-167:167:13). NYP has gone from doing 1,000 yards of excavation of backfill in an entire year to 3,000 yards a week. (T167:5-10). But the skill level in excavation is not particularly high. (T1835-15). What is important are the skills in pouring concrete, and especially finishing concrete, which are possessed by Local 1010 not by Local 175. Finishing concrete is done on sidewalk jobs not street cuts. Local 175 laborers have no training or skills in finishing concrete. That means that they do not have the flexibility of the Local 1010 laborers to do both sidewalks and street cuts in the same day, which is of great economic value and generates community good will. (T180:12-13).

b) Saw Cutting: As we have discussed above, Local 175 laborers have not been doing saw cutting for the past seven years or more. Clearly the Local 1010 laborers have the skill and training in saw cutting.

c) Landscaping and Clean-Up: Skill and training may not be an issue with respect to the particular tasks of landscaping and clean up. But it is certainly the case that Local 1010 has far more experience at landscaping than Local 175, which has not done it at NYP for 10 years and may not have done it ever. Especially significant however is that these tasks are integrated with

more highly skilled tasks on sidewalk work, especially pouring concrete forms. As we have discussed above, the evidence is that it is economical, efficient and buys community good will to have a crew that can do landscaping, clean up and pouring forms all in one integrated operation. As Micelli testified, it would be impossible to have one union pull barricades, i.e. do clean up, and not do the seed and sod and the soil or the joint sealing. (T127:10-18). Local 175 employees have no skills to pour concrete forms. That is exclusively Local 1010 work.

So, the skills that the Local 1010 laborers have that enable them to integrate more highly skilled work, like: 1) finishing concrete on sidewalks; 2) pouring concrete after excavation; and 3) form setting on sidewalks, with less highly skilled work, like excavation, landscaping and clean-up, is a substantial factor favoring the award of each and all of the tasks to Local 1010.

5. Area and Industry Practice.

Excavation: Local 1010 was the only party to offer evidence of area and industry practice. The testimony of Local 1010 VP and Organizer Lowell Barton, together with certifications and collective bargaining agreements of other Local 1010 employers establish that there has been a strong practice in New York for many decades of using Local 1010 members to do utility excavation work. Barton testified that over his 30 years of experience in the City, the practice among many contractors has been to use Local 1010 for utility excavation work. (T748:3-20).

Local 1010 also submitted their Board certifications and proof of their being bound to Local 1010's collective bargaining agreements for nine contractors who Barton testified performed utility excavation and restoration with Local 1010 members. (Local 1010 Ex. 6,7, 8, 9, 12, 13, 14, 15, 16; see also T830:22-T831:18; 839:2-14; 847: 22-848:19; 850:8-851:2; 851:22-852:13; 855:1-7; 856:18-857:6).

There is no evidence whatsoever in the record that any employers in the New York City area use Local 175 members to do the disputed work.

On balance this factor too favors an award of the excavation work to Local 1010.

C. Scope of Award.

Local 1010 requests a broad area wide award of all of the disputed tasks covering the five boroughs of New York City, where the Employer performs work and where the jurisdictions of Locals 175 and 1010 collide. Local 1010 recognizes that the Board customarily declines to grant an area wide award in cases such as this one in which the Charged Party represents the employees to whom the work has been awarded and to whom the Employer contemplates continuing to assign the work. *LIUNA local 1184 (High Light Electric)*, 355 NLRB 167, 170-171 (2010). However, Local 1010 submits that there are extraordinary circumstances that provide sufficient evidence that conflict is likely to recur because Local 175 will not accept the Employer's decision. Local 1010 points to the last 12 years of conflict between Local 1010 and Local 175 that has resulted in a myriad number of unfair labor practice cases in Region 29. Local 1010 submits that the depth of the conflict is intense and prolonged between the two unions; because it arises out of the trusteeship of Local 1010 as part of LIUNA's internal reform program to eliminate mob influence in LIUNA's local unions. The trusteeship led to the debarment by LIUNA of many former officials of Local 1010 and its affiliated locals and those individuals helped establish Local 175. Since that time, Local 175 has mounted a full-scale assault, using state and federal court, arbitration and administrative proceedings, to attempt to become the dominant asphalt paving and road building local in New York City.

For this reason, we urge the Board to depart from precedent and find that the circumstances warrant an area-wide award in favor of Local 1010.

IV.

CONCLUSION

Local 1010 respectfully submits that the evidence establishes that employees of New York Paving represented by Laborers Local 1010 are entitled to perform the work of excavation, seed and sod installation; saw cutting and clean up on all current and future Employer job sites in the five boroughs of New York City.

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Respectfully submitted,

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